Supreme Court, U. S.
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# In the Supreme Court of the United States

## NO. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

*Petitioner,*

*vs.*

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

*Respondents.*

## BRIEF OF AMICUS CURIAE DADE COUNTY BAR ASSOCIATION

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**BRIEF OF AMICUS CURIAE**
**DADE COUNTY BAR ASSOCIATION**

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## INTEREST OF AMICUS CURIAE

Amicus Curiae, the Dade County Bar Association, is the largest local Bar Association in the southeastern United States. It has a deep and abiding interest in the administration of criminal justice and vindication of constitutional rights in Dade County, Florida. Prior to the institution of this law suit, the Dade County Bar Association attempted to obtain, through legislation, relief for those persons incarcerated in Dade County without a hearing. However, all efforts in the Florida legislature proved to be fruitless.

Subsequently, the Board of Directors of the Dade County Bar Association voted unanimously to seek permission to intervene as Amicus Curiae, on the side of the Respondents in the United States District Court for the Southern District of Florida. The District Court permitted the intervention, and Amicus Curiae filed Memoranda of Law and participated in argument. After the Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit, the Board of Directors again voted unanimously to seek permission to intervene as Amicus Curiae, which permission was granted. In the Fifth Circuit, Amicus Curiae filed a brief and participated in oral argument. After this Court granted the Petitioner's Petition for Writ of Certiorari, the Board of Directors again voted unanimously for permission to participate as Amicus Curiae.

Thus, the Dade County Bar Association has been deeply involved in efforts to secure the Fourth, Fifth and Fourteenth Amendments rights of the residents of Dade County, even before the institution of this lawsuit.



## STATEMENT OF THE CASE AND OF THE FACTS

Amicus Curiae adopts Respondents' statement of the case and of the facts.

## QUESTIONS PRESENTED

I.

THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS MANDATE THAT A PERSON WHO IS ARRESTED BY STATE OFFICERS IMMEDIATELY BE TAKEN BEFORE A COMMITTING MAGISTRATE IN ORDER THAT PROBABLE CAUSE MAY BE DETERMINED.

II.

THE FOURTH AND FOURTEENTH AMENDMENTS MANDATE THAT A PERSON WHO IS ARRESTED BY STATE OFFICERS IMMEDIATELY BE TAKEN BEFORE A COMMITTING MAGISTRATE IN ORDER THAT PROBABLE CAUSE MAY BE DETERMINED.

III.

THE FILING OF AN INFORMATION BY THE PETITIONER DOES NOT OBVIATE THE CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING.

## ARGUMENT

### I.

### THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS MANDATE THAT A PERSON WHO IS ARRESTED BY STATE OFFICERS IMMEDIATELY BE TAKEN BEFORE A COMMITTING MAGISTRATE IN ORDER THAT PROBABLE CAUSE MAY BE DETERMINED.

The Fourteenth Amendment provides that no state shall deprive any person of liberty without due process of law. The most fundamental aspect of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385 (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545 (1965).

In recent years, this Court has ruled that a hearing must be held *prior* to the deprivation of certain property rights. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), it ruled that a hearing was required prior to the issuance of a writ of replevin; in *Bell v. Burson*, 402 U.S. 535 (1971), it ruled that a hearing was required before a driver's license and vehicle registration could be suspended; in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), it ruled that a hearing was required before the sale of liquor to an individual for one year could be prohibited; in *Goldberg v. Kelly*, 397 U.S. 254 (1970), it ruled that a hearing was required before the termination of welfare benefits; and in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), it ruled that a hearing was required before wages could be garnished.



Therefore, it is inescapable that due process of law *demands* that a person be afforded a prompt preliminary hearing *after* he has been arrested. As the Fifth Circuit said:

> "Incarceration of an untried defendant for up to a month without any scrutiny by a judicial officer of the basis of this incarceration is far more odious to a sense of justice than the temporary deprivation of property without a hearing. Yet the Supreme Court has repeatedly held that such deprivations of property are impermissible." *(Pugh v. Rainwater*, 483 F.2d 778, 787 (5th Cir., 1973))

The fact that most states have enacted legislation which requires that an arrested person must be promptly taken before a committing magistrate clearly demonstrates the extent to which this policy is engrained in our concept of due process of law. In *McNabb v. United States*, 318 U.S. 332 (1942), after pointing out that this type of legislation appears on the statute books of nearly all the states, this Court said that:

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counselled that safeguards must be provided against the dangers of the over-zealous as well as

the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must, with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard — not only in assuring protection for the innocent, but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society." *(McNabb v. United States*, 318 U.S. at 343-344).

The statistics cited by the District Court confirm the wisdom of *McNabb*. Between January 1, 1970, and March 31, 1971, the petitioner decided not to file direct informations in 1,165 cases in which a person had been charged or arrested as a result of police investigation. The majority of these "no actions" were the result of arrests on charges lacking evidence to justify the filing of an information. The District Court's conclusion is inescapable:

> "Obviously, a judicial officer considering probable cause on a preliminary hearing would have promptly disposed of all of these cases with a tremendous saving of human misery (to all those who had been arrested on insuffficient evidence) and of tax dollars (to the average citizen who is paying for the cost of a vastly overcrowded jail facility in Dade County, Florida)." *(Pugh v. Rainwater*, 332 F.Supp. 1107, 1110 (S.D. Fla. 1971))



## II.

## THE FOURTH AND FOURTEENTH AMENDMENTS MANDATE THAT A PERSON WHO IS ARRESTED BY STATE OFFICERS IMMEDIATELY BE TAKEN BEFORE A COMMITTING MAGISTRATE IN ORDER THAT PROBABLE CAUSE MAY BE DETERMINED.

The purpose of a prompt preliminary hearing is to determine the existence of probable cause. In *Mallory v. United States*, 354 U.S. 449 (1957), this court stated that:

> "Tht next step (after arrest) in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause be promptly determined . . . " (*Mallory v. United States*, supra at p. 454 ) (Parenthesis added)

In *Wong Sun v. United States*, 371 U.S. 471 (1963), this court scrutinized an arrest made without a warrant, and dealt with the question of whether the police officers had probable cause to obtain an arrest warrant from a judicial officer on the basis of the information they possessed when they arrested the defendant. Indeed, this court even raised the question of whether the "probable cause" requirements for arrests without warrant might ultimately prove to be stricter than the requirements for arrests with a warrant. In any event:

> "They surely . . . cannot be less . . . Otherwise a principal incentive now existing for the pro-

curement of arrest warrants would be destroyed . . .

* * *

The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complainant officer adduces as probable cause . . . To hold that an officer may act in his own, unchecked discretion on information too vague and too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy.' " (*Wong Sun v. United States*, supra at p.p. 479-482)

The classic explanation of the Fourth Amendment was given by this Court in *Johnson v. United States*, 333 U.S. 10 (1947):

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (*Johnson v. United States*, supra, at p.p. 13-14)

Therefore, it is clear that the Fourth Amendment validity of any arrest must be tested by the criteria which



would be employed by a judicial officer before issuing an arrest warrant. The only way to test the validity of an arrest is to present the arrested person before a neutral and detached judicial officer, who will then determine the existence of "probable cause". Thus, no person may be arrested and incarcerated without a prompt judicial determination of probable cause. *Cooley v. Stone*, 414 F.2d 1215 (D.C. Cir. 1969); *Brown v. Fauntleroy*, 442 F.2d 838 (D.C. Cir. 1971).

## III.

## THE FILING OF AN INFORMATION BY THE PETITIONER DOES NOT OBVIATE THE CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING.

The Petitioner is not a neutral and detached magistrate. His position that his mere filing of an information constitutes a conclusive finding of probable cause is totally untenable.

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), New Hampshire law provided that a prosecuting attorney could also issue a search warrant. Having obtained a search warrant from the prosecutor, the police then searched the petitioner's automobile and obtained incriminating evidence. This Court ruled that the search warrant was invalid. This Court stated that:

"We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who is the chief investi-

gator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the constitution, the search stands on no firmer ground than if there had been no warrant at all . . "*(Coolidge v. New Hampshire*, supra, 403 U.S. at 453)

Therefore, this Court concluded that:

" . . . There could hardly be a more appropriate setting than this for a *per se* rule of disqualification rather than a case-by-case evaluation of all the circumstances . . . The whole point of the basic rule . . . is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations — the 'competitive enterprise' that must rightly engage their single-minded attention." (*Coolidge v. New Hampshire*, supra, at p. 450)

If a prosecutor cannot determine the existence of probable cause for the issuance of a search warrant to search an automobile, then certainly he cannot determine the existence of probable cause for an arrest.

Two other recent decisions of this Court refute the petitioner's position that he is capable of acting in a neutral and detached manner. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this court ruled that a parolee, after arrest, could be returned to custody for violation of parole conditions only after a hearing on probable cause before someone not directly involved. In *Shadwick v. Tampa*, 407 U.S. 345 (1972), this Court set forth the criteria that must



be met for a magistrate to be capable of deciding the existence of probable cause:

" . . . An issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court has long insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v United States*, . . . *Giordenello v. United States* . . . In *Coolidge v. New Hampshire*, supra, the Court last Term voided a search warrant issued by the State Attorney General 'who was actively in charge of the investigation and later was to be chief prosecutor at the trial.'" (*Shadwick v. Tampa*, supra, at p. 350)

Moreover, as was pointed out earlier:

"The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is, therefore, divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication . . . " *(McNabb v. United States*, supra, 318 U.S. at p. 343)

The petitioner's contention that the mere filing of an information eliminates the constitutional right to have

probable cause determined by a neutral and impartial magistrate would establish the petitioner as prosecutor, judge and jury. This constitutes an obviously unconstitutional and untenable mixing of functions which this Court properly condemned in *McNabb*, and which the Fifth Circuit condemned in its opinion below:

> "While a magistrate might well arrive at the same decision as to probable cause as the State Attorney, we hold that due process abhors even the appearance of such entanglement between the prosecutorial and judicial functions as exists under the Florida information prosecution system . . . " *(Pugh v. Rainwater*, 483 F.2d at p. 787)

If the petitioner can obviate the constitutional right to a preliminary hearing by the mere filing of an information, then an attorney for a criminal defendant should be able to file an affidavit stating that there is no probable cause to detain his client, and thus have him released. Defense counsel is as equally disinterested as is the Petitioner, and can certainly provide as fair, impartial and accurate an assessment of the situation as can the Petitioner.

Thus, the Petitioner's position would undermine a fundamental basic requirement of our accusatorial system of criminal law. In *Watts v. Indiana*, 338 U.S. 49 (1949), this Court summarized the essence of the accusatorial system:

> "The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, *the right to a prompt hearing before a magistrate*, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise the accused of his constitutional rights — these are all characteristics of the accusatorial system and manifestations of its demands." *(Watts v. Indiana*, supra, at pp. 54-55) (Emphasis added)

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was forwarded by mail to N. Joseph Durant, Assistant State Attorney, Counsel for Petitioner, 1351 N. W. 12th Street, Miami, Florida; Bruce Rogow, Esq., City National Bank Building, Miami, Florida, Counsel for Respondents; Phillip A. Hubbart, Public Defender, Counsel for Respondents, 1351 N. W. 12th Street, Miami, Florida 33125, and Raymond Markey, Assistant Attorney General, Counsel for Amicus Curiae, State of Florida, Office of the Attorney General, Tallahassee, Florida, this_____ day of_____, 1974.

_____
Attorney